INDEX

CITATIONS

727373—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 746

THE CORBITT COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 9–29) is reported in 66 F. Supp. 129.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1946 (R. 31). Petitioner's motion for new trial was overruled on October 7, 1946 (R. 31). The petition for a writ of certiorari was filed on December 5, 1946. The jurisdiction of this Court is invoked under Section

3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the "federal tax clause" of a standard form government contract for the sale of motor trucks, which provides for the reimbursement of the contractor by the Government in the event that Congress, subsequent to the opening of the bid, increases or imposes new taxes *directly* upon the production, manufacture, or sale of the supplies covered by the contract, can be extended to include reimbursement for subsequently increased taxes imposed upon automobile tires and tubes, component parts of the subject matter of the contract, where the contracting parties agree that the stated price does not include federal taxes as to which a credit or refund is provided under Section 401 of the Revenue Act of August 30, 1935, 49 Stat. 1014, 1025, 1026, as amended, and the payment of this tax has been made by the contractor pursuant to its agreement to reimburse the manufacturer of tires and tubes for any additional taxes he might be required to pay.

STATUTE INVOLVED

Section 553 of the Revenue Act of 1941, 55 Stat. 687, 720, adding Section 3453 to the Internal Revenue Code, provides:

> (a) *Tax Payable by Vendee.*—If (1) any person has, prior to the effective date

of Part V of Title V of the Revenue Act of 1941, made a bona fide contract for the sale on or after such date, of any article with respect to the sale of which a tax is imposed by that Act or an existing rate of tax is increased by that Act, and (2) such contract does not permit the adding to the amount to be paid under such contract of the whole of such tax or increased rate of tax, then (unless the contract prohibits such addition) the vendee shall, in lieu of the vendor, pay so much of the tax as is not so permitted to be added to the contract price.

(b) *Tax Paid to Vendor.*—Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated, and shall be collected and paid to the United States by the vendor in the same manner as provided in section 3467. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner who shall cause collection of such taxes to be made from the vendee.

STATEMENT

On December 20, 1940, petitioner, a truck manufacturer of Henderson, N. C., entered into a contract with the United States to furnish 200 six-wheel Army trucks, complete with tires and tubes corresponding to Army specifications, at the contract price of $7,300 each (R. 9). Article 1 of the contract (R. 4, 12–13), provided that the contract price included any existing federal tax

applicable to the material purchased under the contract; that in the event Congress, subsequent to the date of the opening bid, changed or imposed new taxes applicable directly upon the production, manufacture, or sale of the supplies covered by the contract and these taxes were paid by the contractor, the contract price would be increased or decreased accordingly and any amount due the contractor as a result of such change would be reimbursed by the Government; and that the contract price did not include any federal tax as to which a credit or refund is provided under Section 401 of the Revenue Act of August 30, 1935, 49 Stat. 1014, 1025–1026, as amended. The contract permitted the Government, at its option, to increase the number of trucks called for by the contract not to exceed 100 (R. 14). On May 5, 1941, pursuant to this option, 100 additional trucks of the same kind and price were ordered by Change Order B (R. 9–10).

Prior to the delivery of the 100 trucks specified by Change Order B, Congress enacted the Revenue Act of September 20, 1941, 55 Stat. 687. Section 535 of this Act, 55 Stat. 687, 709, increased the federal sales tax on tires and tubes by more than 100 percent, effective October 1, 1941 (R. 14–15).

Petitioner did not manufacture the 600 tires and 600 tubes required for these trucks (R. 9) but purchased them from B. F. Goodrich Company, Akron, Ohio, under separate purchase orders dated June 6 and June 30, 1941, which specified

that the tires were to be used on government defense projects and must conform to certain government specifications (R. 14). The price quoted in the purchase orders was "f. o. b. Henderson, N. C. *and including tax*" (R. 15). [Italics supplied.] These tires and tubes were delivered to petitioner subsequent to the effective date of the Revenue Act of 1941, and petitioner, pursuant to the purchase orders, paid the Goodrich Company $2,340, the amount of the increased taxes (R. 15). That company paid such amount to the United States (R. 15).

The contract between petitioner and the United States was completed April 11, 1942, and on that date petitioner submitted an invoice to the United States in the amount of $2,340, asserting that this sum was due under Article 1 of the contract. Liability for this amount was denied by the Government (R. 16), and on September 11, 1944, the present action was instituted, petitioner alleging that by Section 553 of the Revenue Act of 1941,[1] *supra*, pp. 2–3, it became liable for the increased taxes and that accordingly it was entitled

[1] This section provides that in cases where bona fide contracts of sale of goods covered by the Act are made prior to its effective date and do not permit the addition of the whole amount of the tax to the contract price, the vendee, in lieu of the vendor, shall pay so much of the tax as is not permitted to be added to the contract price; that taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated, and shall be collected and paid to the United States by the vendor.

to reimbursement pursuant to Article 1 of the contract (R. 1–3). The Government contended that the only articles called for by the contract of December 20, 1940 were trucks; that no tax was payable on such trucks and none was collected; that the increased tax on tires and tubes was not applicable directly to "supplies covered by this contract" within the meaning of Article 1 thereof; and that hence the rule announced by this Court in *United States* v. *Cowden Manufacturing Company,* 312 U. S. 34, precluded recovery by petitioner (R. 21). The court below held that it was unnecessary to consider whether or not the *Cowden* case was controlling because Section 401, Title IV, of the Revenue Act of August 30, 1935, exempted both the Goodrich Company and the petitioner, purchaser for resale to the United States, from payment of the taxes here paid (R. 18–29).

ARGUMENT

1. The question presented is narrow and is one which has been previously determined by this Court. Briefly stated, it is whether the "federal tax clause," contained in the standard form government contract here involved, relates only to taxes "made applicable directly upon the production, manufacture, or sale" of the supplies covered by the contract or whether it can be extended to include additional taxes which petitioner paid to the subcontractor-manufacturer

of the tires and tubes, component parts of trucks which were "the supplies" called for by government contract. In *United States* v. *Cowden Manufacturing Company,* 312 U. S. 34, this Court held that under an identical contract provision the United States was not obligated to reimburse the contractor for subsequently enacted cotton processing taxes where the contractor, pursuant to an agreement with its subcontractor, had reimbursed the subcontractor for such tax. This Court held that the contract provision was "precise" and that the tax must be "made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract." It held that a tax on the cloth, thread, and labels which entered into the mechanics' suits, the "supplies" there contracted for, was not a tax applicable to the articles called for by the contract (*id.,* p. 36). It also held that a contrary construction would introduce difficulties not contemplated by the parties since it would force them to trace all subsequently imposed federal taxes back to the one upon whom the obligation to pay first rested, whether the transactions were simple or complex (*id.,* p. 37). In the instant case, as petitioner not only recognizes but urges (Pet., pp. 4–6), the tires and tubes became a component part of the "supplies" called for by the contract. We accordingly submit that the rule of the *Cowden* case requiring that, in order to bring the "federal tax clause" into play, the tax be directly imposed

upon the "supplies," is dispositive of the instant controversy.

2. The court below held that it was unnecessary to determine whether the *Cowden* case was controlling because of what it conceived to be the essential difference in facts between the two cases (R. 22). It held that the contract and specifications here involved, reasonably interpreted, provided for the sale of tires and tubes to the Government and that because Section 401, Title IV, of the Revenue Act of 1935 (49 Stat. 1014, 1025–1026), which amended Sections 620 and 621 of Title IV of the Revenue Act of 1932 (47 Stat. 169, 267), as amended by Sections 4 (a) and (c) of the Act of June 16, 1933 (48 Stat. 254, 255), exempts certain sales to the Government from the taxes, both petitioner and its subcontractor, B. F. Goodrich Company, were exempted from the payment of taxes on such articles. Petitioner does not contest the correctness of this conclusion in a case where there is a separate and distinct sale, but urges (Pet., pp. 6–7) that the conclusion conflicts with applicable law and regulations insofar as they prohibit a credit or refund of tax on tires and tubes used by a manufacturer as a *component part* of an article sold free of the tax to a governmental agency. This argument begs the question. If the tires and tubes constitute a component part of the article sold, then, under the *Cowden* case, *supra,* the federal tax clause does not apply. If they

are not a component part, but constitute an article separate and distinct from the trucks which constitute the main subject matter of the contract, then the objections which petitioner urges to the decision below are inapplicable.

3. Moreover, petitioner may not recover for a second reason set forth in the *Cowden* case. There this Court likewise held that the fair import of the "federal tax clause" was that the United States need reimburse its contractor only for such taxes as the contractor paid pursuant to an obligation imposed by statute and that it was not obligated to reimburse the contractor for taxes which the latter had borne as a matter of contract with its subcontractors (*id.*, p. 36). Petitioner contends (Pet., p. 7) that the *Cowden* case is inapplicable in this aspect because it paid the taxes in question pursuant to the obligation imposed upon it by Section 553 of the Revenue Act of 1941, *supra*, pp. 2–3, rather than by contract.[2] We submit that petitioner's purported distinction lacks substance.

Section 553 of the Revenue Act of 1941 merely provides for the shifting of the manufacturer-

[2] Curiously, petitioner relies upon a dictum in the *Cowden* case, the decision in which case stands unequivocally against it. It also relies upon a dictum in *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, a case in which this Court held that a contractor who had collected a processing tax from the United States pursuant to contract, but which had not paid that tax to the Government because the tax had been held to be illegal, was required to refund the amount so collected. We perceive no force to the dictum, torn from its context.

vendor's excise tax to a vendee in those cases where the parties themselves have not permitted it by the terms of their purchase agreement, unless they have specifically contracted against it.[3] In the instant case, however, petitioner's contract with the tire manufacturer, which specified that the price quoted was "f. o. b. Henderson, N. C. *and including tax*" (R. 30, 31) [Italics supplied], required the excess taxes to be added to the contract price of the tire-tube purchase agreements. Contrary to petitioner's contention, the increased tax which it paid was not paid pursuant to a statutory mandate, but rather in accordance with the agreement between itself and its manufacturer-vendor.

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[3] The legislative history of Section 553 reveals that its purpose was to provide protection to a manufacturer-vendor who inadvertently had failed to protect himself by contract. S. Report No. 673, 77th Cong., 1st Sess., p. 54, states:

"This section also adds an existing-contracts section to the Internal Revenue Code. This section is quite similar to the existing-contracts section included in the Revenue Act of 1932 when the last large bloc of manufacturers' sales taxes was imposed. Your committee believes that provision should be made permitting tax liability to be shifted from the manufacturer to the vendee in the case of sales contracts entered into before the effective date of the particular sales tax or increased rate of tax, but consummated after that date, where the contract does not permit the inclusion of the tax in the sales price. This affords relief to those cases where manufacturers have not been able to protect themselves by inserting a tax clause in their sales contracts to provide that taxes, such as those included in the bill, would be passed on to their vendees. The clause in question is, in language, quite

It is also clear that the tax in question was not imposed upon petitioner, but rather on the manufacturer of tires and tubes purchased by petitioner to produce the final product for sale to the Government. Mere reimbursement of those taxes by the contractor to its vendor pursuant to a contractual obligation does not render it a taxpayer. *Oswald Jaeger Baking Co.* v. *Comm'r.,* 108 F. 2d 375 (C. C. A. 7), certiorari denied, 309 U. S. 683; *Zinsmaster Baking Co.* v. *Comm'r.,* 109 F. 2d 738 (C. C. A. 8); cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175.

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close to the text of section 625 of the Revenue Act of 1932, which now appears as section 3447 of the Internal Revenue Code. * * *."

Senator George explained its object as follows: "This amendment is solely for the purpose of protecting the vendor where the vendor has a bona fide existing contract with the vendee which does not permit him to add the tax." 87 Cong. Rec. 7273 (Sept. 3, 1941).

The Conference Report on the Act, H. Rep. No. 1203, 77th Cong., 1st Sess., dealt with Section 553 as follows:

Amendment No. 141:

"This amendment permits liability for a manufacturers' excise tax imposed by the bill to be shifted from the manufacturer to the vendee in any case where, prior to the effective date of part V of title V of the bill (October 1, 1941, under amendment No. 156), any person has made a bona fide contract for the sale after that date of any article with respect to the sale of which a tax is imposed or the existing tax is increased by the bill and such contract does not permit the adding of the tax, unless the contract prohibits such addition. The House recedes" (p. 18).

For an administrative interpretation to the same effect, see pertinent regulations of the Bureau of Internal Revenue, 26 C. F. R., 1941 Supp., Section 316.3, which provide that "* * * The purpose of section 3453, added by section 553 (b) of the

CONCLUSION

The decision of the court below is clearly correct and there exists no conflict. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
EMERY COX, JR.,
Attorneys.

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Revenue Act of 1941, is to shift under certain conditions the liability for a tax, or for an increase in existing rate of tax, imposed by the Revenue Act of 1941, from the manufacturer to the vendee. The conditions under which such liability is shifted are as follows: First, there must be a bona fide contract made by the manufacturer prior to October 1, 1941, for the sale on or after such date of an article with respect to which a manufacturers' excise tax is imposed, or the rate of an existing manufacturers' excise tax is increased, by the Revenue Act of 1941; second, the contract does not provide for the addition of such tax or increase in tax to the amount payable thereunder; and third, the contract does not expressly or by implication prohibit such addition to the contract price. Where these conditions are present, the vendee becomes liable for the tax or additional tax imposed by the Revenue Act of 1941. In all other cases, the liability remains upon the manufacturer and the full amount of the tax is payable by him."

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